United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

74-1432

ORIGINAL

To be argued by
MICHAEL J. MURPHY

United States Court of Appeals

For the Second Circuit

STERLING NATIONAL BANK AND
TRUST CO. OF NEW YORK,
Plaintiff-Appellee,

against

FIDELITY MORTGAGE INVESTORS,
Defendant-Appellant.

On Appeal from the United States District Court for the Southern District of New York

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DEFENDANT-APPELLANT'S BRIEF

LORD, DAY & LORD
Attorneys for Defendant-Appellant
25 Broadway
New York, New York 10004
(212) 344-8480

MICHAEL J. MURPHY
R. SCOTT GREATHEAD
Of Counsel

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Statement of the Case

1. Nature of the Case

This is an appeal, in an action brought upon a non-interest bearing Two Million ($2,000,000) Dollar promissory note, from an opinion and judgment entered in the United States District Court for the Southern District of New York which granted plaintiff-appellee Sterling National Bank and Trust Company of New York (hereinafter "Sterling") summary judgment and denied defendant-

appellant Fidelity Mortgage Investors' (hereinafter "Fidelity") application to dismiss.

In substance, the Court below (Hon. Marvin E. Frankel, U.S.D.J.) held that as a matter of law: (a) jurisdiction over the person of Fidelity existed, and (b) that the promissory note in question was not materially altered within the meaning of section 3-407 of New York's Uniform Commercial Code (McKinney 1963).

2. Course of the Proceedings Below

A. Commencement of the Action and the Removal

From service of summons to judgment, the proceedings below encompassed approximately two and one-third months. The action was commenced on December 10, 1973 in the Supreme Court of the State of New York upon the service in Florida of a summons and notice of motion for summary judgment in lieu of a complaint pursuant to New York C.P.L.R. §3213.* Pursuant to that statute the notice of motion provided that the action was based upon "an instrument for the payment of money only * * *" (App. 4a). The return date on the notice of motion was January 14, 1974.

On January 9, 1974, the action was removed by Fidelity through its counsel, to the District Court pursuant to 28 U.S.C. §1441 on the ground of diversity. On the same day,

* Section 3213 of the CPLR provides in pertinent part:

"When an action is based upon an instrument for the payment of money only * * * the plaintiff may serve with the summons a notice of motion for summary judgment and the supporting papers in lieu of a complaint." N.Y. C.P.L.R. §3213 (McKinney 1972).

Sterling's counsel was served with notice of the petition for removal (App. 18a). There is no dispute between the parties as to the validity of the removal.

B. The Ex Parte Default Judgment and the Application to Set Aside

As will be demonstrated *infra*, the application for the *ex parte* default judgment was a significant event in this action. Hence, we treat it in some detail.

Once the case was removed, Sterling, aware through the notice of removal that Fidelity was represented by counsel, on January 17, 1974 (8 days after the removal) made an *ex parte* application to the Clerk of the District Court for a default judgment on the specific ground that Sterling had not answered, appeared, or moved with respect to the complaint (App. 19a).* Notice of the *ex parte*

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* Sterling's affidavit to the Clerk provided in pertinent part:

> "This action was commenced in the Supreme Court of the State of New York, County of New York, by a summons and a motion for summary judgment in lieu of complaint, *together with an affidavit setting forth and itemizing the allegations of the complaint, which were served on the defendant Fidelity Mortgage Investors* * * *."
>
> * * *
>
> "The defendant has not answered, appeared or made any motion *with respect to the complaint herein* and its time to answer, appear or otherwise move has expired, and defendant is now in default for failure to answer, appear or move or plead herein." (App. 22a) (Emphasis added).

The *Clerk's Certification Noting Default,* prepared by Sterling, contained the following statement:

> "I further certify that the docket entries indicate that the defendant has not filed an answer or otherwise moved *with respect to the complaint herein* * * *." (App. 24a) (Emphasis added).

Similarly, the default judgment signed by the Clerk includes the recital that Fidelity "not having appeared, answered or made any motion *with respect to the complaint herein* * * *." (App. 19a) (Emphasis added.)

application to the Clerk was not given to Fidelity's counsel, whose identity was set forth in the removal papers. Sterling also elected not to notify Fidelity's counsel after the Clerk had entered a judgment for $1,631,983.89. Fidelity had not answered or moved because, contrary to the plaintiff's representation to the clerk, there was no complaint. Thus there was no default. Moreover, the default could not be taken *ex parte* because Fidelity had appeared through filing the removal petition.

On the afternoon of January 22, 1974, six days after the Clerk's entry of the *ex parte* default judgment, Fidelity's counsel received in the mail a notice of the entry of the judgment from the Clerk of the Court.* On the same afternoon, January 22, 1974, Fidelity applied, by an order to show cause, to have the default judgment set aside. Two grounds were asserted in support of this application: (a) that its time to answer had not run since an initial pleading had not been filed (Rule 81 F.R.C.P.); and (b) that the notice of removal constituted a sufficient appearance and, therefore, the judgment was void since the application was not made to the Court on notice as required by F.R.C.P. Rule 55 (see page 37n., *infra*). In addition, through the affidavit of Kerry B. Fitzpatrick, sworn to on January 23, 1974 (App. 31a), Fidelity raised the issue of the lack of *in personam* jurisdiction over it.

By order of January 30, 1974, the Court below set aside the default and default judgment, and directed Fidelity to deem the summary judgment motion papers the initial

* Ironically, this notice was presumably sent pursuant to F.R.C.P. Rule 77(d), which mandates such a notice "upon each party who is not in default *for failure to appear.*" (Emphasis added). Had this notice not been sent Fidelity would no doubt have first learned of the judgment when attempts were made to execute on it.

pleading, and to file and serve an answer thereto by February 4. Accordingly, on February 4, Fidelity served and filed its answer (App. 10a), which in substance admitted the execution of the promissory note, but raised two affirmative defenses, i.e., lack of *in personam* jurisdiction (as it had on its application to set aside the default judgment), and material alteration of the note. Fidelity's answer also demanded a trial by jury.

C. The Motion for Summary Judgment and the Motion for Dismissal

On February 5, 1974, one day after service of the answer, Sterling noticed a motion for summary judgment returnable 10 days later on February 15. On February 12, Fidelity cross-moved for dismissal on the ground that the Court lacked *in personam* jurisdiction over it. In addition, Fidelity filed papers in opposition to the summary judgment motion contending that genuine issues of fact existed as to the alteration and jurisdictional defenses.

On February 27, the Court, through the entry of an opinion and judgment for $1,629,193, granted Sterling's application for summary judgment, and denied Fidelity's application for dismissal.

Issues Presented

1. Does *in personam* jurisdiction over Fidelity exist as a matter of law?

2. Is there an issue of fact as to whether the promissory note was altered within the meaning of §3-407 of the Uniform Commercial Code?

The Facts

1. The parties

Sterling is a banking association organized under the laws of the United States, having its principal place of business in New York, New York.

Fidelity is an unincorporated business trust organized under the laws of the Commonwealth of Massachusetts. There is no claim in this action that Fidelity does business in the State of New York. Having in excess of 3,000,000 shares outstanding, its shares (shares of beneficial interest) are traded on the New York and Pacific Stock Exchanges. While the proceedings below were pending, Fidelity, in an effort to avoid a drastic reorganization of its capital structure, was negotiating a revolving credit agreement with over 50 banks which held its promissory notes in an aggregate amount of over $160,000,000 (App. 58a). These negotiations resulted in an agreement with the banks becoming effective in April, 1974. Sterling refused to participate in these negotiations, and, of course, in the revolving credit agreement (App. 58a).

2. The dealings between the parties

The facts constituting the transactions between the parties are set forth in the second Fitzpatrick affidavit sworn to on February 8, 1974 (App. 72a). Briefly, they are as follows:

In March, 1972, Sterling, through the use of the telephone, solicited Fidelity in Florida to accept an extension of a line of credit from the plaintiff. Pursuant to its

requirements, Sterling, again through the use of the telephone, requested Fidelity in Florida to maintain a minimum deposit in its bank.* The initial line of credit was for the sum of $1,000,000. In February, 1973, this line was increased to $2,000,000, again at the telephone suggestion and request of Sterling, not Fidelity. As of May 1973, Fidelity in Florida had accordingly borrowed $2,000,000 from the Sterling Bank.

On June 12, 1973 this entire amount was paid off (App. 75a). As of that date there was no outstanding debt between the parties. Contrary to the holdings of the Court below, at no time did the defendant ever negotiate or transact any business in connection with the line of credit, or monies lent under that line of credit, in the State of New York.

Representatives of Fidelity met in New York with representatives of Sterling on only two occasions. The circumstances surrounding these visits are fully set forth in the Fitzpatrick affidavit (App. 72a). The first meeting took place on March 29, 1972, when a Fidelity representative, in New York on other business, visited the offices of Sterling (App. 74a). The second meeting took place in February, 1973, when representatives of Sterling appeared uninvited at a Fidelity shareholders' meeting in New York (App. 75a). Neither visit involved negotiations or the conduct of business with Sterling.

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* This account contained $400,000 at the time of the maturity of the note.

3. The August 17, 1973 note*

On August 14, 1973, Mr. Sciarillo of Sterling telephoned Mr. Fitzpatrick of Fidelity in Jacksonville, Florida, and requested that Fidelity, which was not in debt to Sterling at that time, borrow $2,000,000. Mr. Fitzpatrick agreed and then caused the drawing and execution of the note in Florida, and its mailing in Florida to Sterling.

The note, dated August 17, 1973, called for the payment of $2,000,000 to the order of Sterling on November 7, 1973. The note was a non-interest bearing instrument. It was discounted at 9¼% and the discounted amount was immediately deducted from the proceeds. In effect, therefore, in exchange for the $2,000,000 non-interest bearing note, Fidelity received $1,957,861.00 ($2,000,000 minus 9¼% annually for the period August 17 to November 7, or $42,138.39).

At no time was there an agreement or discussion of what interest, if any, would accrue to Sterling in the event the note was not paid at maturity.

While the note was payable in New York, this term was included on the note to suit Sterling's own needs, and not at the request of Fidelity. The proceeds of the note were forwarded by Sterling to another New York bank in which Fidelity maintained an account.

4. The alteration

As discussed above, the note was a non-interest bearing instrument. Moreover, there was no agreement among the parties that the obligation would draw any interest in the event that the note was not paid by maturity.

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* The circumstances surrounding the issuance of the note are also fully set forth in the affidavit of Mr. Fitzpatrick (App. 72a).

As also noted above, Sterling on January 17, 1974 made an *ex parte* application to the Clerk of the Court for the entry of default judgment pursuant to Rule 55(b) which provides in part that such an application may be made, *inter alia*, if the claim is for a "sum certain or for a sum which can by computation be made certain * * *." Seeking an award of post-maturity interest at a rate of 9¼%, even though the instrument was silent on the matter and the interest allowed by applicable statute is substantially lower (see p. 27, *infra*), Sterling proceeded to present a computation, which it presumably hoped would satisfy the above-quoted portion of Rule 55(b), to the Clerk of the Court, which stated as follows:

> "Interest at 9¼% per annum from
> November 7, 1973 to January 17, 1974 .... $31,963.89
> *Photocopy of Note attached showing 9¼% interest"*
> (App. 69a) (Emphasis added).

The photocopy of the note attached to the computation, in Sterling's words "showing 9¼% interest", contains on its face what appears to be a handwritten entry of the term "9¼" (App. 70a). This entry, of course, is not on the original note mailed in Florida by Fidelity (App. 68a). Presumably on the representation of Sterling that the note showed "9¼%" interest, the Clerk entered a judgment for the plaintiff in an amount including $31,963.89, representing interest at a rate of 9¼% from November 7, 1973 (the maturity date) to January 17, 1974 (the day of the default judgment).*

* Relevant to the issue of fact as to whether the above described use of the "9¼" entry was in good faith, the undisputed fact is that in 1972-73, prior to the entry of the default judgment in the instant case, Sterling had secured at least three similar judgments in New

(footnote continued on next page)

POINT I

The Court below erred in finding that *in personam* jurisdiction exists over Fidelity.

In support of the finding of *in personam* jurisdiction over the appellant Fidelity, the Court below relied upon New York's long-arm statute, C.P.L.R. §302(a)(1), which provides in relevant part:

> "(a) *Acts which are the basis of jurisdiction.* As to a cause of action arising from any of the acts enumerated in this section, a court may exercise personal jurisdiction over any non-domiciliary, or his executor or administrator, who in person or through an agent: (1) transacts business within the State * * *."

The plaintiff's position below, as stated in his memorandum of law in support of the motion for summary judgment, was that "the borrowing of money from a New York bank constitutes the transaction of business within this state for the purpose of subjecting the borrower to *in personam* jurisdiction of the New York courts."* In other words, as the plaintiff would have it, and as the holding below would seem to indicate, whenever a non-resident of New York accepts an offer of a loan from a New York bank, solicited from New York by mail or telephone to any loca-

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York Supreme Court (App. 89a-92a). All of these judgments were on non-interest bearing discounted notes, like the note in the instant case. In all three of these cases, unlike the instant case, Sterling requested and received post-maturity interest, not at the discount rate of the note, but rather at the substantially lower rate allowable by applicable statute (App. 90a-91a). (See pp. 33-34, *infra.*)

* Plaintiff's memorandum of law, filed February 28, 1974, at 4 (see record on appeal, entry no. 20).

tion outside the State, the non-resident has subjected himself to *in personam* jurisdiction in an action brought in New York for default on the loan.

We submit that such an extraordinary extension of New York's long-arm jurisdiction is completely inconsistent with the due process requirement that limits *in personam* jurisdiction to situations where the defendant has "certain minimum contacts with [the forum], such that the maintenance of [the] suit does offend the traditional notions of fair play and substantial justice." *International Shoe Co.* v. *Washington Office of Unemployment Compensation and Placement*, 326 U.S. 310, 316 (1945). Moreover, a finding of *in personam* jurisdiction under the facts alleged herein finds no support in the cases construing C.P.L.R. §302(a)(1).*

A. When a New York resident has voluntarily chosen to contract with a non-resident in a foreign state, jurisdiction under C.P.L.R. §302(a)(1) does not lie.

The leading case dealing with the "transaction of business concept of C.P.L.R. §302(a)(1) is *Longines-Wittnauer Watch Co., Inc.* v. *Barnes & Reineke Inc.*, 15 N.Y.2d 443, 261 N.Y.S.2d 8 (1965). In *Longines*, the defendant, a Delaware

* Although the opinion of the court below referred to the fact that "defendant chose to bring here after removing the case * * * [the question of long-arm jurisdiction,] rather than raising it in the courts of the sovereign which is the source of the governing law" (App. 17a), it is clear that "[t]he mere removal of an action does not constitute a waiver of defendant's objection that the state court lacks jurisdiction over his 'person'." 1A J. Moore, *Federal Practice and Procedure* ¶0.157[3], at 87 n. 11 (2d ed. 1965). See *Goldey* v. *Morning News*, 156 U.S. 518 (1895); *General Investment Co.* v. *Lake Shore Ry.*, 260 U.S. 261 (1922); *Solis* v. *Bailey*, 139 F. Supp. 842 (S.D. Tex. 1956).

corporation operating in Illinois, manufactured special machinery for the plaintiff, a New York corporation. Prior to consummating the agreement, extensive negotiations were held in both New York and Illinois, with key officers of the defendant coming on occasion to New York. The contract was executed in Illinois but expressly provided that it was made in New York and was to be governed by New York law. After the contract's execution, the defendant's president, treasurer, engineers and other employees came to New York on two occasions to discuss problems concerning the defendant's performance of the contract. A consequence of these discussions was the execution of a supplemental contract in New York which increased the purchase price and provided that acceptance was to occur only after the machines had met certain tests, following installation, in New York. The defendant installed and tested machines in New York and two of its engineers were in New York for approximately two months working on the machines prior to acceptance. The machines proved defective and, asserting personal jurisdiction over the defendant on the basis of the "transaction of business" provision of C.P.L.R. §302(a)(1), the plaintiff commenced an action for breach of contract.

The Court of Appeals sustained jurisdiction over the defendant because of the totality of the defendant's voluntary activities within New York. In so holding, the Court found that the non-resident defendant had engaged in "purposeful activity" in New York "and thereby 'invok[ed] the benefits and protection of its laws'." 15 N.Y.2d at 458.

A comparison of the facts involved in the *Longines* case with the facts of the instant case, immediately reveals

that the two cases involve radically different factual situations. The *Longines* case involved a defendant who purposefully came into New York to negotiate and enter into contractual agreements, and who remained within the State for a considerable period of time transacting business which was related to its contract with a New York resident. In contrast, the instant suit involves a defendant who was solicited in Florida by a New York corporation to enter into a loan agreement which was drawn, executed and placed in the mail in Florida for transmission to the plaintiff in New York. As the Twelfth Annual Report of the Judicial Conference of New York recognized, C.P.L.R. §302(a)(1) cannot and should not be read to impose personal jurisdiction over a non-resident in a situation where a New York resident has voluntarily chosen to contract with the non-resident in a foreign state:

> "There is * * * one possible gap in the coverage of C.P.L.R. §302(a)(1). It seems clear that the test, 'transacts any business within the State,' would not be met by a non-resident who contracted outside the State to furnish goods or services within the State and then failed to perform. In this contract area, however, it is by no means certain that the non-resident should be required to defend in the courts of New York an action by a resident. *If the resident chooses to contract with a non-resident in a foreign state, he has done a voluntary, knowing act which will in all probability subject his rights under the contract to the law of the foreign state. In this situation it does not seem unjust that the courts of the foreign state should be the forum for suit by the New York resident.* This situation is to be contrasted with a case where a foreign corporation transacts business in New York with a resident. In such a case, protec-

> tion of residents against acts of foreigners performed locally requires the assertion of jurisdiction over the non-resident by the courts of New York."
>
> *Report of the Administrative Board of the Judicial Conference of the State of New York for the Judicial Year July 1, 1965 through June 30, 1966,* at 340 (1967). (Emphasis added.)

The policy underlying the limited reach of C.P.L.R. §302(a)(1) was well-stated in *McKee Electric Co.* v. *Rauland-Borg Corp.*, 20 N.Y.2d 377, 283 N.Y.S.2d 34 (1967), where the Court of Appeals found no jurisdiction under that section over a foreign manufacturer of equipment shipped to a New York distributor, despite a visit by the defendant's representatives to the plaintiff's offices in New York:

> "In our enthusiasm to implement the reach of the long-arm statute (CPLR 302), we should not forget that defendants, as a rule, should be subject to suit where they are normally found, that is, at their preeminent headquarters, or where they conduct substantial general business activities. Only in a rare case should they be compelled to answer a suit in a jurisdiction with which they have the barest of contact." 20 N.Y.2d at 383.

Similarly, in *Millner Co.* v. *Noudar, Lda.*, 24 A.D.2d 326, 266 N.Y.S.2d 289 (1st Dep't 1966), the Appellate Division admonished,

> "Enthusiasm for extending jurisdiction over foreign persons in foreign lands in limited contact cases, however, may well be tempered by the expectation that the same rule will be reciprocally applied in remote countries against our citizens here." 24 A.D.2d at 329.

B. Appellant is not subject to *in personam* jurisdiction merely because the loan is payable in New York and the creditor is a New York resident.

The weight of authority in New York clearly supports the Judicial Conference's construction of C.P.L.R. §302 (a)(1), and indicates that *in personam* jurisdiction cannot be asserted under that section upon a non-resident defendant in an action brought in New York on a loan merely because the creditor is a New York resident and, at the creditor's request, the loan is payable in New York. A leading case on this point is *Hubbard, Westervelt & Mottelay, Inc.* v. *Harsh Building Co.*, 28 AD2d 295, 284 NYS 2d 879 (1st Dep't 1967). That action was a suit for default on a promissory note which was executed and delivered in Arizona by the defendant, an Oregon corporation, payable to the plaintiff, a New York corporation, in New York in seven installments. The note was given for services rendered by the plaintiff in obtaining a mortgage commitment from a bank, located in New York, to finance the purchase and development of property in Arizona.

The trial court in *Hubbard* held that the service of process on the defendant outside of New York was valid and that jurisdiction over it was acquired on the theory that, since the payment of the note was required to be made in New York, and some payments were already made, this activity constituted "transacting business" in New York within C.P.L.R. §302(a)(1). The First Department disagreed and reversed the holding that *in personam* jurisdiction existed over the defendant. Noting that, as in the instant case, the note was made "payable within [New

York] to accommodate the payee," 28 A.D.2d at 299, the *Hubbard* court found:

> "No business whatever was transacted by the defendant within New York and no purposeful act was committed by it in the State." 28 A.D.2d at 297.

A similar holding was made by the court in *Wirth* v. *Prenyl, S.A.*, 29 A.D. 2d 373, 288 N.Y.S. 2d 377 (1st Dep't 1968), where the defendant, an Argentine corporation, contracted with the plaintiff, a New York corporation, for the construction of a plant in Argentina. Pursuant to the contract, the defendant delivered, by its agent, an Argentine bank, promissory notes to a New York bank to be delivered to the plaintiff in New York. As in the instant case, these notes were made payable in New York. After payment was refused on one of the notes delivered to the plaintiff in New York, the plaintiff commenced the action. In dismissing the action for lack of personal jurisdiction, the court stated:

> "The facts that such note was delivered, completed and made payable in New York, and that breach of payment occurred here, are entirely insufficient in themselves to confer jurisdiction upon the courts of this State under C.P.L.R. §302(subd.[a], par. 1). Nor are the scales tipped in favor of subjecting defendants to jurisdiction by the additional fact that the place of payment, New York, was not a fortuitous event, but was intentionally designed to accommodate plaintiff's assignor to avoid taxes in Argentina. The totality of these circumstances does not constitute transacting business in this State under our long-arm statute."

* * *

> "New York was not chosen as the place of payment for the installation of the Argentinian plant to enable defendants to avail themselves of the privilege of doing business in this State. The choice of New York as the place *of payment was to accommodate the payee,* a courtesy extended to permit it to avoid taxes in Argentina. Commercial benefit did not accrue to the defendants by fixing the place of payment in New York, nor was the protection of our laws bargained for." 29 A.D. 2d at 375 (emphasis added).

Similarly, in the instant case, the defendant did not request that the note be made payable in New York. No commercial benefit accrued to the defendant by that term. The protection of New York law was not bargained for. Consequently, *in personam* jurisdiction does not lie. See also, *Franklin National Bank* v. *Krakow,* 295 F.Supp. 910 (D.D.C. 1969); *Ferrante Equipment Co.* v. *Lasker-Goldman Corp.,* 31 A.D.2d 355, 297 N.Y.S.2d 985 (1st Dep't 1969); *Bankers Commercial Corp.* v. *Alto,* 30 A.D.2d 517, 289 N.YS.2d 993 (1st Dep't 1968); *Pacific Concessions, Inc.* v. *Savard,* 75 Misc.2d 219, 347 N.Y.S.2d 484 (Sup. Ct. 1973).

C. None of the facts relied upon below supports a finding of *in personam* jurisdiction.

In finding personal jurisdiction over appellant, the opinion of the Court below stressed the appellant's "personal contacts in New York" and "defendant's undisputed use of plaintiff as agent to convey proceeds for credit to defendant at another New York bank." (App. 17a). However, in so doing, the court ignored the weight of authority which clearly indicates that none of the facts alleged by appellee constitutes the basis for *in personam* jurisdiction under C.P.L.R. §302(a)(1).

1. Fidelity's "personal contacts in New York"

Representatives of Fidelity met in New York with representatives of Sterling on only two occasions. (See page 7, *supra*). The circumstances surrounding these visits are fully set forth in the Fitzpatrick affidavit (App. 72a). Neither of these visits involved negotiations nor the conduct of business with Sterling, and they do not constitute a basis for imposing *in personam* jurisdiction on Fidelity.* A case in point is *Bankers Commercial Corp* v. *Alto, Inc.*, 30 A.D.2d 517, 289 N.Y.S.2d 993 (1st Dep't 1968).

The *Bankers Commercial* case was a suit based upon an assigned conditional sales contract between the plaintiff, a New York corporation, and the defendant, a Virginia corporation. The contract provided that money due under the contract was payable by the defendant in New York. As in the instant case, all the business contacts between the parties to the contract were by telephone. Similar to the instant case, on two occasions representatives of the defendant visited the plaintiff's office in New York for either social reasons or to discuss a settlement of differences. Contrary to the holding below, the court in *Bankers Commercial* held that the facts that money under the contract was payable in New York, and that the defendant had twice visited the plaintiff's office in New York, were insufficient to support a finding of *in personam* jurisdiction under C.P.L.R. §302(a)(1):

> "The two visits of defendant's representatives to plaintiff in New York were either for social reason or

* Although the court below described the visits as "having clearly business origins and significance" (App. 17a), it is submitted that such a characterization constituted a finding of fact, and as such was improper in a summary judgment context.

> to discuss a settlement of differences. The fact that payment of money due under the assigned conditional sales contract were to be made and in fact were partially made in New York is insufficient to confer jurisdiction. Alone, such contacts with this state do not constitute purposeful acts sufficient to sustain jurisdiction." 30 A.D. 2d, at 517.

See, also, *McKee Electrical Co.* v. *Rauland-Borg Corp.*, 20 N.Y.2d 377, 283 N.Y.S.2d 34 (1967), where the Court of Appeals found no jurisdiction over a foreign manufacturer of equipment shipped to a new York distributor, despite a visit by the defendant's representatives to the plaintiff's offices in New York:

> "Otherwise, every corporation whose officers or sales personnel happen to pass the time of day with a New York customer in New York runs the risk of being subjected to the personal jurisdiction of our courts." 20 N.Y.2d, at 382.

2. *Sterling's transfer of the funds at Fidelity's request*

Neither is it significant that, on Fidelity's instructions, Sterling transferred the proceeds of the note to a third party in New York.* Obviously, any loan agreement between a non-resident and a New York creditor will involve the latter's transfer of the proceeds of the loan. It is

* Although the court below did not refer to this fact in its holding, it is also not significant that, at Sterling's request, and as a condition to the loan, 10% of the face value of the loan was deposited with Sterling in New York in an account for Fidelity. As the opinion in *Impex Metals Corp.* v. *Orement Chemical Corp.*, 333 F.Supp. 771, 775 (S.D.N.Y. 1971) suggests, where the defendant maintains a bank account in New York as an accommodation to the plaintiff, it does not constitute a transaction of business within the meaning of C.P.L.R. §302(a)(1).

difficult, if not impossible, to imagine any loan transaction in which the creditor will not perform some ministerial act for the debtor, such as dropping a check for the proceeds in the mail, or, as occurred here, transferring the proceeds to another bank for the debtor's credit. To hold, as did the court below, that this type of activity constitutes "purposeful activity" by the non-resident in New York which subjects him to *in personam* jurisdiction under C.P.L.R. §302(a)(1), is the same as holding that personal jurisdiction exists over *all* non-resident debtors merely because the creditor is a New York resident and the loan is payable in New York.

Moreover, as the court in *Hubbard, Westervelt & Mottelay, Inc.* v. *Harsh Building Co., supra,* recognized, the mere fact that the creditor performs for the debtor a service in New York does not support a finding that the *debtor* committed a purposeful act within the State. The note sued upon in the *Hubbard* case "was given for services rendered by plaintiff in obtaining a mortgage commitment from a bank, located in New York, to finance the purchase and development of property in Arizona." 28 A.D. 2d, at 296. If, as the court found, "no business whatever was transacted [in New York] by the defendant" in *Hubbard* (28 A.D.2d, at 297), *a fortiori,* Fidelity transacted no business within the State merely because Sterling transferred the proceeds of the note to a third party.

The only case cited by the Court below in holding that *in personam* jurisdiction exists over Fidelity is *Irving Trust Co.* v. *Smith,* 349 F. Supp. 146 (S.D.N.Y. 1972). The facts involved in that case are clearly distinguishable from

the instant case. *Irving Trust* was an action to recover on four promissory notes. Two of the notes were delivered to the plaintiff by the defendant, a citizen of Massachusetts, in New York. The other two notes were delivered and executed in Massachusetts. All of the notes were collateral notes, the security being shares of stock, with a cross-collateralization provision in each, held in New York. All of the notes were issued in connection with the purchase of stock in New York City by the plaintiff bank on behalf of the defendant. The court held that there was jurisdiction since in that case, unlike the instant case, "[t]he loan was made by a New York bank which acted as the defendant's agent for the purchase of stock in New York." 349 F.Supp. at 148.

No logical comparison exists between the facts in *Irving Trust,* where the plaintiff-creditor purchased stock in New York on the defendant's behalf with the proceeds of four separate notes, and the facts of the instant case, where Sterling merely transferred the proceeds of the note in question to another New York bank.

D. Appellant's claim does not arise out of a transaction of business in New York.

Assuming, *arguendo,* that any of appellant's actions in New York *prior to* the execution of the note in question on August 14, 1973 constituted the transaction of business in New York, the instant claim does not arise out of those transactions. This action was brought pursuant to New York C.P.L.R. §3213 to enforce a claim, in the words of the statute, "based upon an instrument for the payment of money only * * *." As such, by its very terms, it is not an

action based upon a breach of a loan agreement or an action based upon a breach of a line of credit agreement. The alleged claim or cause of action arises solely from the face of one document, the note upon which the suit is based. It is undisputed that the note was drawn, executed and placed in the mail in Florida. Although the note was payable at the payee's bank in New York, this term was not included at the request of the defendant.

In the conclusory affidavit of Mr. Fowler filed in support of the summary judgment motion (App. 6a), the reader is led to believe that the August 1973 note resulted from a long series of negotiations going back to April of 1972. However, as the affidavit of Mr. Fitzpatrick points out (App. 75a), as of June 12, 1973 there was absolutely no debt outstanding between the parties, since on that day the defendant paid $2,000,000 to the plaintiff. Thus, even assuming that prior to August 14, 1973 business had been transacted in New York, the issuance of the instant note was a distinct and separate transaction from what had transpired prior thereto. Accordingly, the instant claim or cause of action does not arise out of the events which occurred prior to August 14, 1973 when Mr. Sciarillo, on behalf of Sterling, telephoned Fidelity in Florida to request the appellant to borrow money from Sterling. As such, the instant claim does not "arise out of" the transaction of business in New York.

In *Fontanetta* v. *American Board of Internal Medicine*, 421 F.2d 355 (2d Cir. 1970), the plaintiff, as the appellee in the instant case, attempted to ground his jurisdictional allegations on transactions out of which his cause of action

did not arise. The defendant was a foreign corporation which licensed physicians. It permitted the plaintiff to take a written examination in New York. Plaintiff passed the written examination but failed to pass oral examinations which were conducted in Philadelphia and St. Louis. Suing in New York, the plaintiff based his personal jurisdiction allegation on a transaction of business by the defendant in New York, i.e., the conducting of the written examinations.

This Court, in rejecting this jurisdictional basis, held that where there are two separate transactions, as there are in the instant case, the cause of action must arise directly from the transaction which took place within the State.

Similarly, in the instant case, assuming *arguendo,* that prior business transactions between the parties took place in New York, the instant claim, by its very terms, arises only out of the August 17, 1973 note. Concerning this note, there simply was no purposeful activity in the State on the part of the appellant. *Gelfand* v. *Tanner Motor Tours, Ltd.,* 339 F.2d 317, 321-22 (3d Cir. 1964); *Greenberg* v. *R.S.P. Realty Corp.,* 22 A.D.2d 690, 253 N.Y.S.2d 344 (2d Dep't 1964).

POINT II

There is a triable issue of fact as to whether the note was altered within the meaning of U.C.C. §3-407.

On January 17, 1974, Sterling made an *ex parte* application to the Clerk of this Court for a default judgment. In doing so, it requested and received post-maturity interest at a rate of 9¼ per cent. In support of this request it submitted to the Clerk a document entitled "Statement for Default Judgment" (App. 69a) which purported to set forth the post-maturity interest computation. It read in pertinent part:

> "Interest at 9¼% per annum from
> November 7 to January 17, 1974 ..... $31,963.89
> *Photocopy of Note attached*
> *showing 9¼% interest"*
> (Emphasis added)

The copy of the note appended to that statement bears on its face a handwritten entry of the term "9¼" (App. 70a). This entry was not on the note which Fidelity mailed on August 13, 1973 (App. 68a). As such, it constitutes an alteration of the original. Moreover, the alteration was utilized by Sterling to represent to the Clerk of this Court that the contract of the parties embodied in the note provided for post-maturity interest of 9¼% per cent. As such, we submit, there is, at the very least, a question of fact as to whether the alteration, and the use of it, constituted a material alteration within the meaning of §3-407 of the Uniform Commercial Code.

Section 3-407(2) of the Uniform Commercial Code provides in substance that where a holder of a note alters the

instrument, other parties to the note, with the exceptions not relevant here, are discharged if a) the alteration is material, and b) if the alteration is fraudulent. The statute provides in pertinent part:

> "As against any person other than a subsequent holder in due course
>
> (a) alteration by the holder which is both fraudulent and material discharges any party whose contract is thereby changed unless that party assents or is precluded from asserting the defense."

As will be demonstrated, the alteration in the case at bar was certainly material (see "A" below), and at the very least, a question of fact exists (a question of fact decided by the District Court on the summary judgment motion) as to whether or not it could be considered fraudulent ("B" below).

A. The alteration was material.

1. Section 3-407(1) provides that an alteration of a negotiable instrument is material if it would change the contract of any of the parties thereto in any respect. It reads:

> "Any alteration of an instrument is material which changes the contract of any party thereto *in any respect*, including any such change in
>
> * * *
>
> (c) the writing as signed, *by adding to it* or by removing any part of it." (Emphasis added).

The official commentary to this section of the U.C.C. makes clear that when the statute defines "material" to include

any change in the contract of the parties "in any respect," it means just that:

> "any change in the contract of a party, however slight, is a material alteration: and the addition of one cent to the amount payable, or an advance of one day in date of payment, will operate as a discharge if it is fraudulent." Commentary, N.Y. U.C.C. §3-407 (McKinney).

The alteration in the instant case, and more particular its use, had the intended effect of imposing upon Fidelity an obligation to pay post-maturity interest which was not due under the contract or applicable statute (see "2" below). As such it was material. *Weyerhauser* v. *Dun,* 100 N.Y. 150 (1885) (alteration which obligates party to pay post-maturity interest is material); see, also, *Meyer* v. *Huneke,* 55 N.Y. 412 (1874); *McGrath* v. *Clark,* 56 N.Y. 34 (1874); *Columbia Distl. Co.* v. *Rech,* 151 A.D. 128 (4th Dep't 1912); *Meadow Brook National Bank* v. *Seaboard Die-casting Corp.,* 52 M.2d 922, 276 N.Y.S. 2d 822 (Sup. Ct. 1966).

2. This is not to say that the holder of such a non-interest bearing note would not normally be entitled to post-maturity interest. Section 3-122(4) of the Uniform Commercial Code provides:

> "*Unless an instrument provides otherwise,* interest runs at the rate provided by law for a judgment.
>
> * * *
>
> (b) * * * from the date or accrual of the cause of action." (Emphasis added).

Pursuant to §3-122(1)(a) of the same statute, the accrual of the instant cause of action occurred on November 8, 1973, the day after maturity. Accordingly, the allow-

able post-maturity interest rate, the same as a judgment rate, was 6%. N.Y. C.P.L.R. §§5003, 5004 (McKinney 1972).*

3. Nor does it make any difference that the alteration was discovered and actually inflicted no damage on the defendant. As the New York Court of Appeals stated in *Meyer* v. *Huneke, supra*:

> "To allow parties to take the chances of success in fraudulently raising the amount of the written obligations of their debtors, without risk of loss in case of detection, would be an encouragement to this description of fraud which the law should not afford.
>
> It is said, on the other hand, that the debtor has sustained no injury by the fraud, and that he should not be permitted to profit by the unsuccessful attempt of his creditor to defraud him. It is true that, where the fraud is detected in season, the debtor sustains no pecuniary loss; but he has been intentionally exposed to injury. The alteration may have been so skilfully made as to render detection difficult, or the debtor might have become infirm or died, and the altered instrument successfully imposed upon his representatives. It is for the purpose of discouraging such attempts that the law denies relief to a plaintiff who comes into court with his hands soiled with a fraud so inexcusable." 55 N.Y. at 419.

See also, *Barton Savings Bank & Trust Co.* v. *Stephenson*, 87 Vt. 433, 89 Atl. 639, 643 (1914) ("Any alteration which may in any event alter the rights, duties or obligations of the party sought to be charged is material in the legal sense").

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* New York's C.P.L.R. §5003 provides that every "money judgment shall bear interest from the date of its entry." C.P.L.R. §5004 provides that interest "shall be at the rate of six per centum per annum * * *."

In the Court below, Sterling contended that the "9¼" entry was not material since it was a mere marginal memorandum made by a bank clerk. In support of this contention, it submitted an affidavit from a Mr. Anthony Grosso (App. 86a) who was not even employed at the branch of the bank where the entry was supposedly made (App. 87a). However, assuming *arguendo*, that the Grosso affidavit was accurate, the result would still be the same. If the holder of a note attempts to make what would ordinarily be considered a marginal notation part of the contract evidenced by the note (as Sterling clearly did here in its default application), the notation will be considered a material alteration. *Gray* v. *Williams*, 91 Vt. 111, 118-19, 99 A. 735, 738-39 (1917):

> "It follows that words written by a party upon the margin of an instrument after its execution and delivery constitute an alteration, *if intended to affect the term of the instrument*, and they would have such effect if there when the instrument was executed." (Emphasis added.)

Another authority in point is *Clifton Merchantile Co.* v. *Gillaspie*, 15 S.W.2d 607 (Tex. 1929). There the holder of a note claimed, as Sterling does here, that additional writings on the note, in that case as to the time and place of payment, were mere marginal memoranda. It also argued that the maker of the note agreed before execution to the terms reflected by the entries. In affirming a verdict for the maker of the note, the court held that if the holder intends a notation to become part of the contract between the parties, the notation will be considered a material alteration. The court reasoned that since the holder claimed it was entitled to the benefits reflected by the notation, it must

have intended the notation to be part of the contract evidenced by the note:

> "The question as to whether the memorandum made upon the note becomes a part thereof, so as to constitute a material alteration of the note, is largely determinable by the position of the added words, coupled with the intention with which the same is placed thereon, and the legal effect of the addition on the contract itself. *If it appears that the holder of the note intended by the notation placed thereon to make the language added a part of the contract evidenced by the note, then it will not be held a mere marginal notation* if such language, when fairly construed, affects the time or place of payment." 15 S.W.2d at 608. (Emphasis added).

Similarly in the instant case, Sterling, the holder of the note, insists the "9¼" entry was a mere marginal notation. Yet it undisputedly utilized the entry to claim the benefit of post-maturity interest under the contract embodied in the note. Indeed, in the Court below, it, like the holder in *Gillaspie*, claimed that Fidelity agreed to pay 9¼% post-maturity interest prior to execution of the note.* Accordingly, here, as in *Gillaspie*, the holder of the note not only intended the entry to reflect what it contended was the con-

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* For example, Sterling's statement submitted pursuant to the District Court Trial Rule 9(g) provides in pertinent part:

> "6. The rate of interest agreed to be paid under said note was 9¼% per annum." (App. 52a).

Similarly, the affidavit of John J. Fowler, Jr., a bank officer, submitted in support of the summary judgment motion, provides in pertinent part:

> "The insertion of '9¼' is not an alteration and at any rate is not material. The defendant agreed to the 9¼ rate and the notation on the note was made merely for use in the bank's internal operation." (App. 56a).

Indeed, Sterling in the Court below continually sought a judgment which would include a 9¼% post-maturity interest rate (App. 49a).

tract between the parties, but moreover, actually secured a judgment on the note as altered. As such, the entry was clearly intended to be, and was, material.

B. Was the entry fraudulent?

Section 3-407 of the Uniform Commercial Code requires a material alteration to be fraudulent in order to have legal significance. At the very minimum an issue of fact exists as to whether the alteration in this case meets that criteria. Of course, in a summary judgment context, all possible factual inferences are to be resolved in the favor of the party resisting judgment. *Adickes* v. *S. H. Kress & Co.*, 398 U.S. 144 (1970). The Court below, did (we submit), just the opposite. It resolved this issue of fact in favor of Sterling in the following manner:

> "All the papers of every kind were open to defendant's distinguished law firm at every stage of the proceeding. Everybody knew that none of these papers would in the end escape scrutiny. It is patent that nobody had the slightest intention of tricking the court, the defendant, or defendant's astute counsel." (App. 16a).

In resolving this issue of fact as a matter of law, the Court below denied Fidelity its right to go to the jury on the issue of Sterling's intent.

1. The making of the entry

In the Court below Sterling, through the use of the above mentioned affidavit of Mr. Anthony Grosso, attempted to explain the origin of the entry (App. 86a). He stated that the bank's usual procedure is to routinely make marginal notations of the interest rate on all discounted

notes at the time of discount, in this case August, 1973. Accordingly, the note in question bears an entry "9¼" in its upper left hand corner (App. 88a) which was presumably made in August. Mr. Grosso then explained that in September, 1973, the note was transferred to the main office of the bank, an office at which he was not employed. Mr. Grosso then stated that some unnamed individual in the main office made, presumably also as part of routine, the second "9¼" entry on the face of the note. Mr. Grosso did not state how he knew this to be the fact. Nor did Mr. Grosso explain why, in view of the first entry, the second entry was necessary. Also unexplained is why the second entry, unlike the first, was not placed in the margin of the note, rather than on its face.

However, even if Mr. Grosso's affidavit is accepted at face value, the result, we submit, would be the same. That is, even if the alteration was originally made with an innocent intent, its subsequent use by the holder to knowingly attempt to secure monies it was not entitled to is an intentional ratification of the alteration which would nevertheless render it fraudulent. If this were not the case, a holder of a note which had been innocently altered (for example, the face amount doubled by computer error) could attempt to negotiate such an instrument as altered with impunity.

Contentions similar to that argued by Sterling in the Court below have been consistently rejected by the Courts. For example, in *Paul* v. *Leeper,* 98 Mo. App. 515, 72 S.W. 715 (Mo. 1903), the holder of a note disclaimed an intentional alteration, but nevertheless sued on the instrument as altered. The court, rejecting the holder's contentions, stated:

> "Plaintiff has sued on the notes as they now appear, and his theory has been that they have not been altered. If there was a mere spoilation, then plaintiff should have presented that theory in his case. It has been ruled that, where one sues on a 'contract in its altered state' he adopts the alteration and makes it his own." 98 Mo. App. at 520, 72 S.W. at 716.

Similarly, in *Singer Sewing Mach. Co.* v. *Burger*, 92 Neb. 539, 138 N.W. 741 (1912), because suit was brought on a note as altered, the Court rejected the argument that the alteration was the unauthorized act of the holder's agent, and therefore unintentional on the part of the holder:

> " 'When the holder of a note had notice that it had been altered by changing the amount, and with such notice sued upon it in its altered condition, and endeavored to recover thereon, held, that he thereby ratified the act of alteration * * *'." 92 Neb. at 544, 138 N.W. at 743.

Accord, Hardt v. *Phillips Pipe Line Co.*, 885 S.W.2d 202 (1935):

> "[D]efendant maintains its right in this action to keep of record the contract, which the trial court has held to have been fraudulently acknowledged, and in thus relying upon the wrongful acknowledgment it must be viewed as having ratified the act of the employee having in obtaining the notary's unlawful acknowledgment * * *." 85 S.W.2d at 207.

See also, *People's Finance Co.* v. *Sabanovich*, 26 S.W.2d 187, 189 (Tex. 1930); *Newmeyer* v. *Newmeyer*, 41 P.2d 294 (Colo. 1935); *Murphy* v. *Holliway*, 16 S.W.2d 107 (Mo. 1929); *Holloway* v. *Wheeler*, 261 S.W. 467, 468 (Tex. 1924), *rev'd on other grounds*, 276 S.W. 653 (Tex. 1925) (by suing on altered contract, one "thereby ratified and adopted the alteration if the same was in fact made.").

In the instant action, of course, Sterling took far more affirmative action than merely bringing suit on an altered instrument. It actually sought and received judgment based on the alteration. As such it is completely irrelevant if the "9¼" entry was in fact made routinely by a bank clerk as indicated in the Grosso affidavit.

2. The intent concerning the use of the alteration

In the Court below, Sterling proffered two inconsistent explanations as to its use of the alteration on the default application. Initially it contended that Fidelity had agreed to pay post-maturity interest at 9¼% and presumably, therefore, there was no intent to deceive (see pages 30-31, *supra*). Secondly, it contended that it thought it was entitled by law to 9¼% post-maturity interest, and therefore its use of the alteration was not intended to be deceptive (App. 108a).

As to the first contention, Fidelity vigorously denied any such agreement (App. 10a). To this extent, there is at least an issue of fact. This is also the case as to the second contention for the fact is that there were at least three similar judgments, on the same type of non-interest bearing discounted notes, secured by Sterling in the New York Supreme Court prior to the entry of the *ex parte* default judgment in this action (see page 9n., *supra;* App. 90a-91a). In each of those actions, Sterling requested and received post-maturity interest at the rate allowable by applicable statute (see page 27n., *supra*). The most recent of these state court judgments was in August, 1973. How can it be, therefore, that in this particular case, Sterling somehow thought it was entitled, not to the statutory rate,

but rather to the discounted rate of the note?* The answer to this query is one to be arrived at by the trier of the facts, the jury Fidelity has demanded, and not summarily by the Court. As this Court stated in *Cross* v. *United States*, 336 F.2d 431, 433 (2d Cir. 1964):

> "Summary judgment is particularly inappropriate where the inferences which the parties seek to have drawn deal with questions of motive, intent and subjective feelings and reactions." (Citations omitted).

It is, and was, similarly inappropriate in the instant case.

3. *The opinion of the Court below*

There are two possible explanations for the use of the alteration, i.e., a) Sterling thought in good faith it was entitled to post-maturity interest of 9¼% and therefore thought its reliance on the alteration was immaterial, or b) it acted with a "ask not—get not?" philosophy regardless of legal right. The Court below resolved this factual issue by opting for the first alternative. In doing so, it not only deprived Fidelity of its right to have the matter resolved by a jury, but, moreover, it based this finding of fact on reasoning that simply does not reflect the underlying facts or applicable law.

a. The Court placed great weight (App. 15a) on the fact that the note evidenced what it felt was a valid debt and that the alteration defense did not exist until the applica-

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* It should also be noted that Sterling, a commercial bank, handles commercial paper on a daily basis. As such it must operate within (and presumably be knowledgeable of) the provisions of Article 3 of the U.C.C. on a regular basis. See, i.e., *United States* v. *Sterling National Bank & Trust Co.*, 360 F.Supp. 917 (S.D.N.Y. 1973), rev'd, —— F.2d —— (2d Cir., 3/27/74), slip op. 2393.

tion for the *ex parte* default judgment was made, or more precisely, until the alteration was utilized by Sterling. In doing so, the Court ignored the fact that in just about each and every reported case involving a material alteration, the note as unaltered, originally represented a valid debt. Nevertheless, because of the policy reasons (see p. 27, *supra*) behind the rule, the debt is extinguished. Moreover, in each of the cases cited on page 26, *supra*, the defense of material alteration did not arise until such time as the holder of the note sought to enforce it as altered in a court action (as Sterling did here).

b. The Court, in resolving the issue of fact as to Sterling's intent, referred to what it termed the fact that all of the default papers were open to Fidelity and its counsel at all times. Therefore, according to the Court, there could have been no intent to deceive (see page 30, *supra*). With deference, we submit this holding simply ignores the facts surrounding the default application. While the opinion of the Court below is silent on the issue, the fact is that the default judgment application was *ex parte*. No advance notice of it was given to Fidelity or its counsel (see pp. 3-4, *supra*) even though Sterling was aware that Fidelity was represented by counsel. Indeed, even after the judgment was entered, Sterling elected not to notify Fidelity or its counsel. If it were not for the Clerk's perfunctorily mailing a notice of the entry, which was not required if the default judgment was proper (see p. 4n., *supra*), Fidelity would not have learned of the circumstances until an attempt was made to execute. Whether at that time, Fidelity would have sought to resist the entry of default judgment, or merely acquiesced in its execution, and thus remained ignorant of the use of the alteration, is pure conjecture.

c. The Court below also reasoned that Sterling was "driven" to move for the default judgment (App. 14a), and, therefore, presumably Fidelity should not now be able to take advantage of it. This reasoning, we submit, misses the mark.

In the first instance, assuming *arguendo*, that Fidelity was "driven" to move for a default judgment, it certainly was not coerced to seek that judgment on an *ex parte* basis, based on an alteration of the instrument, in an amount it was not entitled to. In every case where a note is not paid at maturity, it could be said that the holder was "driven" to institute legal action. This would hardly excuse, however, the intentional use of an alteration in the action to seek a higher judgment than that to which it was entitled. If this were not so, all of the cases discussed *supra*, page 26, would have been decided differently.

Moreover, the fact is Sterling was not driven to do anything of the kind. After the removal, Sterling had three legitimate procedural options. Initially, it could have filed and served a complaint in the District Court since the Federal rules do not contain the expedited procedure provided by C.P.L.R. §3213. Secondly, if it felt a pleading was not necessary, it could have re-noticed its motion for summary judgment in the District Court, and thereby, pursuant to F.R.C.P. Rule 6(d), triggered Fidelity's time to file papers in opposition.* See, i.e., *Instituto Per Lo Sviluppo E.D.I.M.* v. *Sperti Products, Inc.*, 47 F.R.D. 310 (S.D.N.Y. 1969). The third option open to Sterling, if it believed that Fidelity was

* Rule 6(d) of the FRCP provides in pertinent part:

"[O]pposing affidavits * * * [to a motion] * * * may be served not later than 1 day before the hearing * * *."

in default for failing to respond to the papers filed in the state court, was to apply *on notice* to the District Court for a default and default judgment pursuant to F.R.C.P. Rule 55(b).* Rather than pursue any of these avenues, Sterling elected to seek an *ex parte* default judgment from the clerk. In these circumstances, it is difficult to conceive how it was driven to take such a step.

d. The Court below also seemed to imply that because Fidelity removed the case to the Federal court while it was unaware of the alteration defense, it should be precluded from raising it after the removal.

> "It is clear now, as defendant's counsel has conceded at an oral hearing of the pending motions, that defendant had no defense on the merits of this case when the action was filed in state court as an expedited proceeding allowing a claim for summary judgment as the opening pleading." (App. 14a.)

While it is true that Fidelity did not, based on the facts now known to it, have the alteration defense at the time of removal, it clearly had the defense of lack of personal jurisdiction.** As was pointed out, *supra*, page 11n., such a de-

* Rule 55 of the F.R.C.P. provides that default judgment applications are to be made on notice to the Court (not the clerk) if there has been an appearance. A sufficient "appearance" for the purposes of the rule is some type of indication that the defaulting party intends to defend the suit (in the instant case, the notice of removal). 6 J. Moore *Federal Practice & Procedure*, ¶55.05[3]; *H.F. Livermore Corp.* v. *Aktiengesellschaft*, 432 F.2d 689 (D.C. Cir. 1970) (settlement discussions suffices); *Dalminter, Inc.* v. *Jessie Edwards, Inc.*, 27 F.R.D. 491 (S.D. Tex. 1961) (letter from defendant's officer to plaintiff indicating that defendant corporation was not in existence at time of acts alleged in complaint).

If after a sufficient appearance, notice of the default judgment application is not given, the judgment is void as a matter of law. *Press* v. *Forest Labs., Inc.*, 45 F.R.D. 354, 357 (S.D.N.Y. 1968).

** This issue was brought to the Court's attention on Fidelity's application to set aside the default judgment, see page 4, *supra*.

fense is not waived by a removal to the Federal courts. Moreover, since the alteration defense (based on the facts as now known) did not arise until the alteration was used on the *ex parte* default application, it is difficult to conceive how the defense could have been raised earlier. In addition, absent prejudice, the defense of material alteration may be properly raised at any time during a litigation, even as late as the trial of the action. *Johnson* v. *Cordes*, 33 Cal. App. 619, 165 P. 1040 (1917).

Conclusion

For the reasons stated above, it is respectfully submitted that the judgment entered below should be vacated. The District Court should be directed to dismiss the action for lack of *in personam* jurisdiction. Alternatively, the entry of summary judgment should be vacated on the grounds that triable issues of fact exist as the jurisdictional and alteration defenses. Additionally, Fidelity should be granted its costs, and such other and further relief as to this Court may seem just and proper.

Respectfully submitted,

LORD, DAY & LORD

By Michael J. Murphy

MICHAEL J. MURPHY
Attorneys for Defendant-Appellant

MICHAEL J. MURPHY
R. SCOTT GREATHEAD
Of Counsel

May 20, 1974

C 321—Affidavit of Service of Papers by Mail.
Affirmation of Service by Mail on Reverse Side.

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Index No.

STERLING NATIONAL BANK & TRUST COMPANY OF NEW YORK,

-Plaintiff-
against appellee

FIDELITY MORTGAGE INVESTORS

-Defendant-
appellant

AFFIDAVIT OF SERVICE BY MAIL

STATE OF NEW YORK, COUNTY OF New York *ss.:*

The undersigned being duly sworn, deposes and says:

Deponent is not a party to the action, is over 18 years of age and resides at

36-16 24th Street, Long Island City, New York 11106

That on May 20 *19* 74 *deponent served* 2 copies of the annexed Appellant's Brief & APPENDIX

on Harry Gurahian
attorney(s) for plaintiff-appellee
in this action at 540 Madison Avenue, N. Y., N. Y. 10022
the address designated by said attorney(s) for that purpose by depositing a true copy of same enclosed in a postpaid properly addressed wrapper, in—a ~~post office~~—official depository under the exclusive care and custody of the United States Postal Service within the State of New York.

Sworn to before me

May 20, 1974
Jacob A. Friesen

JACOB A. FRIESEN
NOTARY PUBLIC, State of New York
No. 24-0413550
Qualified in Kings County
Certificate filed in New York County
Commission Expires March 30, 1976

Roy G. Nelson

The name signed must be printed beneath

Roy G. Nelson

C 321—Affirmation of Service of Papers by Mail.
Affidavit of Service By Mail on Reverse Side.

Index No.

Plaintiff

against

Defendant

ATTORNEY'S AFFIRMATION OF SERVICE BY MAIL

STATE OF NEW YORK, COUNTY OF ss.:

The undersigned, attorney at law of the State of New York affirms: that deponent is attorney(s) of record for

That on 19 deponent served the annexed

on
attorney(s) for
in this action at
the address designated by said attorney(s) for that purpose by depositing a true copy of same enclosed in a postpaid properly addressed wrapper, in—a post office—official depository under the exclusive care and custody of the United States Postal Service within the State of New York.

The undersigned affirms the foregoing statement to be true under the penalties of perjury.

Dated

The name signed must be printed beneath

Attorney at Law